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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL ANTHONY JORDAN, Defendant and Appellant.	H026293 (Santa Clara County Super. Ct. No. BB257361)

Defendant Michael Anthony Jordan was convicted in a jury trial of two counts of attempted murder (Pen. Code,[1] §§ 187, 664), one count of first degree burglary (§§ 459, 460, subd. (a), two counts of attempted robbery of an inhabited place (§§ 664, 213, subd. (a)(1)(A)), two counts of assault with a deadly weapon (§ 245, subd. (a)(1)), and one count of possessing a slungshot (§ 12020, sub. (a)(1)). The charges arose out of an incident in which defendant and five other teenagers attempted to steal marijuana from the home of a medical marijuana patient. The jury found true enhancement allegations that defendant personally used a deadly and dangerous weapon (§ 12022, subd. (b)(1)), that defendant inflicted great bodily injury on his two victims (§§ 12022.7, subd. (a), 1203, subd. (e)(3)), and that the victims were present in the residence at the time of the burglary (§ 667.5, subd. (c)(21)). The jury concluded that enhancement allegations that

[1] All further statutory references are to the Penal Code, unless otherwise stated.

the attempted murders were premeditated and deliberate were not true. Although defendant was 17 years old at the time of the offenses, he was tried as an adult. He was sentenced to 16 years eight months in prison on the attempted murder, burglary, and possession of a slungshot counts. Sentencing was stayed on the other counts pursuant to section 654.

On appeal, defendant challenges the sufficiency of the evidence to support the jury's finding of a specific intent to kill. He contends the trial court abused it discretion under Evidence Code section 352 by allowing the jury to hear the 911 tapes from the date of the incident and in excluding evidence that one of the victims had suffered a prior conviction for auto theft. He also asserts that the court erred when it excluded evidence that one of the victims was on misdemeanor probation at the time of the assaults. We find no error and will affirm the judgment.

FACTS

The offenses occurred on May 1, 2002. The night before, defendant spent the night at the home of his friend, Jeremy S. They had been friends for about 18 months. They went to the same continuation high school, saw each other outside school weekly, and smoked marijuana together.[2]

On May 1, 2002, defendant and Jeremy drove to another continuation high school in Jeremy's car and picked up Jeremy's friends, Chris C. and Jeff P. While he was talking to his mother on his cell phone, Jeremy overheard Chris say something to defendant about "jacking" (stealing) something. Chris asked Jeremy to give them a ride to Paul S.'s house. Along the way, they picked up Jeff's friend, Mike J.[3]

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[2] According to the probation report, defendant smoked marijuana daily.

[3] For ease of reference, we shall refer to "Mike J." as "Mike" and to defendant, who also used the nickname "Mike" and had a last name that began with the letter "J," as "defendant." We shall refer to the other boys in the group by their first names.

After they got to Paul's house, Jeremy heard Chris offer Paul some marijuana if he would drive the boys to the Barrymore home in Mountain View. Jeremy saw Jeff stuff a large, plastic garbage bag into his pocket. Jeremy decided to move his car over one block. As he went to move the car, defendant asked him to grab a white tube sock he had left on the front seat of the car. The sock was heavy because it had a tow ball from a trailer hitch inside of it. Jeremy had seen defendant use the sock and tow ball a couple of weeks before while "fake fighting" with friend.

Jeremy moved his car, grabbed the sock, and walked back to Paul's house. When he got there, the other boys were inside Paul's Volkswagen van. Jeremy got inside the van and handed the sock and tow ball to defendant. Defendant put the sock and tow ball inside his right front pants pocket. As they drove to the Barrymore home, Chris and the others talked about "jacking someone for weed."

John Barrymore and his wife, Rebecca Barrymore, lived in Mountain View with their 16-year-old son and two daughters, ages five and eight. John Barrymore suffered from migraine headaches and had a prescription from his physician to use marijuana to relieve his headaches. John Barrymore estimated that he had 10 to 11 large marijuana plants in his backyard and six large plants in a "grow room" in his garage. He also had a number of starts or seedlings in the grow room. He had a total of 70 to 80 plants. He disputed a statement in the police report that suggested he had 122 plants. He stated the police could have arrived at that number if they counted seedlings he had already thrown out.

Defendant and his companions arrived at the Barrymore home at about 1:30 p.m. Both John and Rebecca Barrymore were home, working on computers in their den. Their two cars were parked in the driveway. Everyone except Paul got out of the van and walked to the far side of the Barrymore's garage. Chris knew the Barrymore's son and that they had marijuana on the premises. Chris told Jeremy to go to the front door and ask for the Barrymore's son. Jeremy and defendant went to the front door. Defendant

knocked on the door; Rebecca Barrymore answered. Defendant asked for "John."[4] Rebecca Barrymore replied, "John my husband or John my son?" One of the boys said "Johnny." Rebecca Barrymore responded, "It's 1:30. He's at school, and why aren't you?" The boys shuffled their feet, looked at each other, and said they would come back later.

Defendant and Jeremy returned to the group near the garage. Chris said he would go to the front door. He told Jeremy to whistle if he saw the cops. Chris, Jeff, and defendant went to the Barrymore's front door. Right before they left, defendant pulled the sock with the tow ball out of his pocket, spun it around his hand, and put it back in his pocket. As the others left, Jeremy and Mike walked toward the Barrymore's side gate.

About five minutes after the first group of boys left, Rebecca Barrymore heard a single loud bang on her front door. This time, John Barrymore answered the door and Rebecca Barrymore stayed in the den. John saw two teenaged boys at the door. They asked for Barrymore's son. When John Barrymore told them his son was not home, defendant asked, "Is he in school?" John Barrymore responded, "Yes. What's this about?" Defendant stated, "It's about this," said something about a bomb,[5] and entered the house, swinging the sock with the tow ball.

Defendant hit John Barrymore in the head with the sock and tow ball. John Barrymore went down, on one or both knees. Defendant hit him in the head again. John Barrymore fell onto his left side, felt a buzzing, tingling feeling in his body, and could not get up. He felt paralyzed for a minute. John Barrymore did not take a fighting stance, throw any blows at the boys, or grab defendant.

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[4] Jeremy testified that the Barrymore's son was named "Robert" and that the boys asked for Robert. Mrs. Barrymore testified that her son's name was John and that the boys asked for John.

[5] According to defendant's police interview, the word "bomb" meant "weed" or marijuana.

Rebecca Barrymore heard some scuffling, a groan, and someone hit the floor. She came out of the den and saw defendant standing over her husband, swinging the sock down on his head. She stepped into the living room, put her arms up, and yelled, "Get out!" Defendant stopped the motion toward her husband, lifted his head, and looked at her. Rebecca Barrymore described his face as expressionless, blank, and very controlled. Rather than leave through the open front door, defendant took one giant step toward Rebecca Barrymore. He started to swing the sock again, so she put up her left arm to break the blow directed at the side of her head. The tow ball struck her just above the left elbow and brushed the side of her face. She ran into the kitchen. Just as she entered the kitchen, she felt a blow to the back, left side of her head. She took two steps and felt another blow to her spine. The latter blow knocked her to her knees. She felt a second blow to her back and spine. It felt as if someone had slammed her with something incredibly hard. She collapsed. Her face hit the floor. Her body felt electrified and she blacked out.

John Barrymore heard his wife screaming and the sounds of her being beaten. He heard one of the boys egging the other on. He tried to get up but could not. He screamed, "I can't move my body!" The boys left through the front door. On the way out, defendant said something insulting and kicked John Barrymore in the ribs while he was on the floor.

When Rebecca Barrymore regained consciousness, she was laying in a pool of blood. She heard her husband in the living room, moaning. She pulled the phone off the counter and tried to call 911. Her hands and the phone were covered with blood. John Barrymore crawled into the kitchen. Rebecca Barrymore could not read the numbers on the telephone, so she handed the phone to her husband. She told him to call 911, forced herself up, and ran to the house next door. Her neighbor grabbed a towel, applied pressure to Rebecca Barrymore's head to stop the bleeding, and helped her call 911. John Barrymore also called 911.

Defendant, Chris, Jeff, Jeremy, and Mike ran to a nearby cul-de-sac. Paul picked them up in the van. A community service officer for the City of Mountain View was in the area. The community service officer did not have the authority to pull the van over, but followed the van until other officers could respond. At one point, he lost sight of the van. He then saw three boys (Jeremy, Mike, and Jeff) walk away from the van. He followed the three boys. Eventually, other officers detained the boys. When the community service officer returned to the point where he had last seen the van, it was gone. Paul, defendant, and Chris went back to Paul's house. Paul and Chris were arrested shortly thereafter. Defendant paid a stranger to drive him to Santa Clara. Defendant showered and changed his clothes at his friend's house, then went home and shaved off his goatee and mustache. He was arrested as he was leaving home to go to his sister's house in Aptos. Defendant later told Jeremy he planned to flee to Mexico.

As he fled the scene, defendant dropped the sock and the tow ball. They were never recovered.

John Barrymore sustained two large scalp lacerations and a depressed fracture of the left parietal skull. The bone fragments moved inward toward the brain, but did not damage the brain tissue. Although he was left with three dents in his skull, John Barrymore could only recall two specific blows to the head. John Barrymore had surgery to repair the skull fracture and bring the depressed bone fragments back into position. The neurosurgeon used three small titanium plates and 14 screws to fix the fracture. John Barrymore's medical bills exceeded $53,000.

Rebecca Barrymore sustained a nondisplaced fracture of the spinous process of the first thoracic vertebra and a laceration on the back of her head. Her fracture did not require surgery. Her physician stapled the laceration. He opined that her loss of consciousness was consistent with a closed head injury or concussion. Although she bled a lot from her scalp wound, she did not bleed inside her skull or in the brain. Her medical bills were over $35,000.

The police interviewed defendant on the night of the incident. The jury saw a videotape of the police interview. Defendant told the police officer that he asked John Barrymore "for the weed" and that John Barrymore "started getting crazy" and tried to grab him and hit him. He also said Rebecca Barrymore came after him and tried to hit him. Initially, defendant told the officer he had a rock in the sock. Later, he admitted it was a tow ball. He said he brought it along for protection and to break a lock.

Defendant did not present any witnesses and did not testify. On cross-examination, Jeremy testified that the boys did not discuss any specific plans regarding how they were going to steal the marijuana before they got to the Barrymore home. They did not discuss hurting or killing anyone.

DISCUSSION

Sufficiency of the Evidence of an Intent to Kill to Support the Attempted Murder Convictions

Defendant contends the attempted murder convictions should be reversed because there was insufficient evidence of a specific intent to kill. He argues that absent any evidence of animus toward the Barrymores or evidence that defendant had threatened to kill the Barrymores, the evidence was insufficient to support the attempted murder convictions.

" 'The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] [¶] Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination

depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder. [Citations.]' [Citation.]" (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

Attempted murder requires: (1) a specific intent to kill another human being and (2) the commission of a direct but ineffectual act toward accomplishing the intended killing. (*People v. Lee* (2003) 31 Cal.4th 613, 623; *People v. Moore* (2002) 96 Cal.App.4th 1105, 1112 (*Moore*).) " 'In deciding whether or not such an act was done, it is necessary to distinguish between mere preparation, on the one hand, and the actual commencement of the doing of the criminal deed, on the other. Mere preparation, which may consist of planning the killing or of devising, obtaining or arranging the means for its commission, is not sufficient to constitute an attempt. However, acts of a person who intends to kill another person will constitute an attempt where those acts clearly indicate a certain, unambiguous intent to kill. The acts must be an immediate step in the present execution of the killing, the progress of which would be completed unless interrupted by some circumstances not intended in the original design.' " (*Moore, supra,* 96 Cal.App.4th at p. 1112 citing CALJIC No. 8.66.)

To constitute an attempt to murder, " ' "[t]he wrong-doer must specifically contemplate taking life; and though his act is such as, were it successful, would be murder, if in truth he does not mean to kill, he does not become guilty of an attempt to commit murder." [Citation.]' [Citations.]" (*People v. Bland* (2002) 28 Cal.4th 313, 327-328.) The defendant's mental state must be examined separately as to each alleged attempted murder victim. (*Id.* at p. 328.)

"There is rarely direct evidence of a defendant's intent. Such intent must usually be derived from all the circumstances of the attempt, including the defendant's actions." (*People v. Chinchilla* (1997) 52 Cal.App.4th 683, 690.)

Contrary to defendant's assertion, the prosecution did not need to prove that defendant threatened to kill the Barrymores or that defendant harbored any animus toward the Barrymores. While such evidence may support a finding of a specific intent to kill, evidence of threats or animus toward the victim is not required to support such a finding. A review of two cases is illustrative.

As the victim in *Moore* walked from her car to a public building near a park, the defendant lunged at her with a knife, stabbing her in the abdomen. (*Moore, supra*, 96 Cal.App.4th at pp. 1108-1109.) The victim sustained a three- to four-inch stab wound that penetrated her abdominal cavity and posed a substantial risk of death. (*Id.* at p. 1109.) The defendant had never met the victim and did not threaten the victim. He stabbed her because he felt like doing it. He just wanted to stab somebody, to see what it would be like. (*Ibid.*) He claimed he had no intention of killing her. The defendant, like the defendant in this case, argued that while he had an intention to stab the victim, there was insufficient evidence of a specific intent to kill. The court disagreed, observing that the defendant had lunged at the victim with all his might and had stabbed an extremely vulnerable area of the victim's body. Given the violent nature of the attack, the court concluded that the jury's finding that the defendant had intended to kill his victim was supported by substantial evidence. (*Id.* at p. 1114.)

The defendant in *People v. Osband* (1996) 13 Cal.4th 622, 655-656, entered a second grade classroom and, without saying a word, started beating and choking a teacher who was grading workbooks. There was no evidence that he knew the teacher or bore her any animus. The defendant claimed he beat her because he was having a bad day. He hit her at least 15 times. (*Id.* at p. 655.) She bled profusely and eventually blacked out. She sustained various facial fractures, including a broken jaw. She also sustained three large lacerations, including one within an inch of her carotid artery. (*Id.* at p. 656.) Because of the force of the attack, she was convinced the defendant intended to kill her. The defendant argued that there was insufficient evidence of a specific intent

to kill to support his conviction for attempted murder. The Supreme Court disagreed. It concluded, "In addition to the nature of her injuries and other physical evidence, the brutality of the attack on her and the drawing of the curtains so that medical aid might not soon reach her all permitted a rational trier of fact to find beyond a reasonable doubt that he committed the crime." (*Id.* at p. 692.)

The defendants in both *Moore* and *Osband* neither knew nor threatened their victims. After reviewing the totality of the circumstances, the courts concluded that there was sufficient evidence of a specific intent to kill in both cases. We therefore reject defendant's argument that there must be evidence of a threat or animus toward the victim to support a finding of a specific intent to kill.

Our review of the record persuades us that there was substantial evidence from which a rational jury could find beyond a reasonable doubt that defendant possessed a specific intent to kill both John Barrymore and Rebecca Barrymore.

Jeremy testified that defendant asked him to retrieve the sock and tow ball from the car before the group left for the Barrymore's house. While defendant claimed he intended to use the weapon to break a lock, he also said he needed it for protection. Defendant knew how the slungshot worked, as Jeremy had seen him "fake fighting" with it a couple of weeks before the incident. Defendant told Jeremy someone could get knocked out "or hurt really bad" by this weapon and said, "One shot is a knockout." After they had learned the Barrymores were home and as they prepared to go to the door a second time, defendant took the slungshot out of his pocket and spun it around his hand, as if practicing to use it. As he crossed the threshold into the Barrymore home, defendant wound up the slungshot and flung it at John Barrymore's head. After Barrymore went down, defendant wound up the weapon again and hit him a second time in the back of the head. Barrymore recalled at least two blows to the back of his head, there could have been more. The blows opened up John Barrymore's skull and left a permanent crater on the side of his head. His injuries included two large lacerations and a depressed skull

fracture that required surgical repair. The attack left three dents in his skull. Defendant was standing over John Barrymore, getting ready to hit him again, when Rebecca Barrymore interrupted the attack. The jury saw photographs of blood on the Barrymore's carpet and living room from the attack on John Barrymore. Rebecca Barrymore thought her husband was bleeding to death.

As for Rebecca Barrymore, defendant had already seen the injuries the slungshot had inflicted on John Barrymore. In spite of that, when Rebecca Barrymore entered the room, defendant turned and tried to hit her in the head with the weapon. She put up her arms and deflected the first blow. Defendant chased her into the kitchen. His second blow hit her on the back of her head. She felt a sharp pain and her whole body was covered with blood. Defendant struck her with the slungshot two more times. Although those blows landed on her upper back, the jury could have reasonably concluded that defendant was aiming for her head, since she was moving away from the defendant as he inflicted the last two blows. The blows were so severe that Rebecca Barrymore blacked out and collapsed into a large pool of blood. She testified that it felt like somebody had slammed her with something incredibly hard. The jury saw photographs of the large pool of blood on the kitchen floor where Rebecca Barrymore landed, as well as her bloodstained clothing.

The fact that defendant struck multiple blows and directed the blows at both victims' heads, a particularly vulnerable part of their bodies given the nature of the weapon used, the severity of the Barrymores' injuries, and the circumstances detailed above permitted a rational trier of fact to find beyond a reasonable doubt that defendant had the specific intent to kill both of his victims.

Admissibility of 911 Tapes

After defendant left the victims' home, Rebecca Barrymore ran next door and, with the assistance of her neighbor, called 911. John Barrymore also called 911 from his

house. Over defendant's objection, the trial court admitted the tape recordings and the written transcripts of both 911 calls into evidence. Defendant assigns two claims of error related to the admission of the 911 tapes. Defendant contends the trial court erred because it failed to weigh the prejudicial effect of the tapes against their probative value and thereby failed to exercise its discretion under Evidence Code section 352. Defendant also contends that the trial court abused its discretion in admitting the 911 tapes under Evidence Code section 352 because they were irrelevant and inflammatory and served merely to arouse the passions of the jury.

We review a trial court's decision to admit or exclude evidence under Evidence Code section 352 for an abuse of discretion. "Under Evidence Code section 352, the trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time. [Citation.] Where, as here, a discretionary power is statutorily vested in the trial court, its exercise of that discretion 'must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]' [Citation.]" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.)

We find no merit to defendant's claim that the court erred because it failed to engage in the balancing process required under Evidence Code section 352. "[A] court need not expressly weigh prejudice against probative value or even expressly state that it has done so, if the record as a whole shows the court was aware of and performed its balancing functions under Evidence Code section 352. [Citations.]" (*People v. Taylor* (2001) 26 Cal.4th 1155, 1169.) At the beginning of trial, defendant made a motion in limine to exclude the 911 tapes pursuant to Evidence Code section 352 on the grounds that they were irrelevant because he was not challenging the facts contained in the tapes and that they were inflammatory. The trial court stated that the tapes would be corroborative of what the Barrymores testified to, that the tapes would be admissible in

an ordinary assault case, and that the tapes were made close in time to the attacks. The court noted that the tapes were "no more prejudicial than the testimony of the Barrymores themselves" and admitted the tapes. In addition, defense counsel referred to Evidence Code section 352 in his argument regarding the admissibility of the tapes. Based on the argument below and the court's analysis, we conclude the court considered both the probative value and the prejudicial effect of the 911 tapes.

Defendant argues the trial court abused its discretion because the prejudicial impact of the tapes outweighed their probative value. Defendant argues that the tapes were prejudicial because: (1) the jury heard Rebecca Barrymore's distraught voice and heard her crying, (2) Rebecca Barrymore told the dispatcher six times that she and her husband had been attacked, and (3) Rebecca Barrymore expressed concern for her husband and relief that their children were not at home at the time of the assaults. Defendant also points to the neighbor's statement that John Barrymore was bleeding to death and the facts that John Barrymore's voice was agitated and he expressed concern for his son.

We have listened to the 911 tapes and conclude that the court did not abuse its discretion when it found that the probative value of the tapes outweighed their prejudicial effect. Rebecca Barrymore told the 911 operator that she had been assaulted, described the nature of her injuries and the first aid rendered by her neighbor, attempted to give the 911 operator a description of her assailant, and expressed concern for her husband and children. She moaned at various points on the tape, but not excessively. At the beginning of the call, she sounded distraught. But as time passed, she calmed down and attempted to assist the operator by describing her assailant. She cried toward the end of the call, as she waited for the paramedics to arrive.

At the beginning of the second tape, John Barrymore told the 911 operator he was "pouring blood everywhere" and sounded distraught. But he regained his composure as

he learned that his wife was safe at a neighbor's house. Toward the end of the call, shortly before the police arrived, he told the operator he thought he was going to pass out.

Both tapes were relevant to prove the circumstances of the crime and disprove defendant's self-defense claim, since neither victim mentioned fighting back or attacking defendant. They were also probative on the issues of the severity of the Barrymores' injuries and the fact that Mrs. Barrymore thought her husband was near death, both of which were relevant to the question of defendant's intent on the attempted murder charge and the other offenses charged in the case. Given the probative value of the 911 tapes, we cannot say the trial court abused its discretion when it concluded that the probative value outweighed the prejudicial effect of the tapes.

Limitations on Defendant's Cross-Examination of John Barrymore

A. Exclusion of Evidence That John Barrymore Was On Probation

Defendant contends the court violated his constitutional right to effective cross-examination when it excluded evidence that, at the time of the assaults, John Barrymore was on probation for two misdemeanor convictions. Defendant contends that if he had been permitted to question John Barrymore about his probation status, he could have gotten in evidence that the police had recommended prosecuting John Barrymore for having an excessive number of marijuana plants in his home and that the prosecutor had shielded Barrymore from such a prosecution. Defendant argues that John Barrymore was disingenuous with the police officers at the time of the investigation because he did not want them to see how many marijuana plants he was cultivating and that his status as a probationer affected his credibility.

It is a "well established principle that the defense is entitled to elicit evidence that a witness is motivated by an expectation of leniency or immunity [citations] or that he [or she] is on probation or parole." (*People v. Dyer* (1988) 45 Cal.3d 26, 49-50.) Quoting

from *Delaware v. Van Arsdall* (1986) 475 U.S. 673, the *Dyer* court observed, " 'trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on . . . cross-examination [into the potential bias of a prosecution witness] based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive *or only marginally relevant*.' [Citation.]" (*Id*. at p. 48.)

"*Van Arsdall* emphasized that a trial judge has broad latitude in restricting cross-examination which is repetitive or only marginally relevant. [Citation.] There is no Sixth Amendment violation at all unless the prohibited cross-examination might reasonably have produced 'a significantly different impression of [the witness's] credibility . . . .') [Citation.] If cross-examination was improperly restricted, the prejudicial effect of the error on the trial as a whole depends on a multitude of factors, including the cumulative nature of the lost information, the extent of cross-examination otherwise permitted, the degree of evidence corroborating the witness, and the overall strength of the prosecution case. [Citation.]" (*People v. Rodriguez* (1986) 42 Cal.3d 730, 750-751, fn. 2 (*Rodriguez*).)

At the time of the assaults, John Barrymore was on probation for two misdemeanor convictions: resisting arrest (§ 148) and disturbing the peace (§ 415). From the record, it appears both convictions arose out of the same event or occurred at that same time. The trial court concluded that these were not crimes of moral turpitude that impacted defendant's credibility and excluded evidence that Barrymore was on probation for these prior misdemeanor convictions on relevancy grounds. The record on appeal does not disclose the terms or conditions of Barrymore's probation. In our view, the fact that John Barrymore was on misdemeanor probation was only marginally relevant and had a potential to confuse the issues in this case. At trial, defendant conceded the burglary and assault with a deadly weapon charges. The primary issue was the existence

of a specific intent to kill for the attempted murder charges, which turned on evidence related to defendant's conduct, not John Barrymore's background.

Defendant asserts the fact that John Barrymore was a probationer caused him to be less than candid with the police, because he feared being convicted for a probation violation or some other offense related to the amount of marijuana he had grown. He also contends that this provided John Barrymore with a reason to be partial toward the prosecution. However, the evidence does not support the conclusion that John Barrymore hid anything from the police or the jury related to his cultivation of marijuana. The evidence included photographs of the marijuana plants in Barrymore's back yard and the grow room in his garage. Although Barrymore estimated he had 70 to 80 marijuana plants, the police reported that there were 122 plants. Defendant was permitted to impeach John Barrymore with that information. He also attempted to impeach Barrymore by suggesting that he was growing more marijuana than his physician recommended.[6]

Given the severity of the assaults, the photographic and medical evidence that corroborated John Barrymore's injury claims, the 911 tapes, and Rebecca Barrymore's testimony, cross-examining John Barrymore about his probation status would not have produced a significantly different impression of his credibility. We therefore conclude that the trial court did not err when it excluded evidence of John Barrymore's probation status.

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[6] Barrymore testified that Oakland was the only jurisdiction that limited the number of marijuana plants, that he did not know whether his physician recommended fewer plants than what he had for medicinal purposes, that 72 seedlings generally result in seven to 10 mature plants, and that he was not concerned about being prosecuted for something else. In his view, he did everything in accordance with Proposition 215, the Medical Marijuana Initiative. Defendant did not present any evidence that contradicted that testimony.

B. Exclusion of Evidence of John Barrymore's 1985 Conviction for Auto Theft

Defendant contends the trial court erred when it excluded evidence of John Barrymore's 1985 conviction for auto theft, which defendant had offered for impeachment. Although the prosecutor and the court acknowledged that auto theft is a crime of moral turpitude, the court denied defendant's request because the 17- to 18-year-old conviction was too remote in time. Defendant contends the trial court erred because it failed to balance the probative value against the prejudicial effect of the evidence and thus failed to exercise its discretion under Evidence Code section 352. He also contends the court erred because the prejudicial effect of the evidence was minimal and the conviction had a bearing on John Barrymore's credibility.

Prior felony convictions that involve moral turpitude are admissible for impeachment subject to the court's discretionary power under Evidence Code section 352. (*People v. Clair* (1992) 2 Cal.4th 629, 654 (*Clair*).) In exercising their discretion, trial courts are guided by the factors set forth in *People v. Beagle* (1972) 6 Cal.3d 441 and its progeny. When the witness subject to the impeachment is not the defendant, those factors include "whether (1) the conviction reflects on honesty and (2) it is near in time. [Citation.]" (*Clair, supra*, 2 Cal.4th at p. 654.) In *Clair*, the California Supreme Court held that the trial court did not abuse its discretion when it precluded the defendant from impeaching a third party witness with a 22-year-old manslaughter conviction because it was remote in time. (*Id.* at pp. 654-656; see also *People v. Von Villas* (1992) 11 Cal.App.4th 175, 226-228 [order precluding impeachment with 20-year-old felony burglary conviction, that was followed by two misdemeanor convictions, on the grounds that the felony conviction was too remote in time was not an abuse of discretion].)

As noted previously, we review a trial court's ruling under Evidence Code section 352 for an abuse of discretion and will not disturb that ruling on appeal unless the court " 'exercised its discretion in an arbitrary, capricious or patently absurd manner that

resulted in a manifest miscarriage of justice.' [Citation.]" (*People v. Rodrigues, supra,* 8 Cal.4th at pp. 1124-1125.)

As for defendant's contention that the court failed to engage in the required balancing process under section 352, as noted before, "a court need not expressly weigh prejudice against probative value or even expressly state that it has done so, if the record as a whole shows the court was aware of and performed its balancing functions under Evidence Code section 352. [Citations.]" (*People v. Taylor, supra,* 26 Cal.4th at p. 1169.) In addition to the 1985 felony conviction, John Barrymore had a number of misdemeanor convictions both before and after 1985. In evaluating the admissibility of the prior convictions, the court considered both of the relevant factors: whether the conviction involved a crime of moral turpitude, implicating honesty, and whether it was remote in time. As parts of its analysis the court expressly considered the "probative value" of the recent conviction for resisting arrest. Based on this record, we conclude that the court engaged in the requisite weighing process under Evidence Code section 352.

Citing *People v. Mendoza* (2000) 78 Cal.App.4th 918, 925 (*Mendoza*) and *People v. Green* (1995) 34 Cal.App.4th 165, 183 (*Green*), defendant argues that the court should not have excluded the 1985 auto theft conviction because John Barrymore has not led a "legally blameless life" since that time. Barrymore had a misdemeanor conviction for possessing burglary tools in 1988, an expunged drug offense in 1989, and the resisting arrest and disturbing the peace misdemeanor convictions in 2001. The court concluded that none of these convictions were crimes of moral turpitude.

This case is distinguishable from *Mendoza* and *Green*. The courts in both cases admitted evidence of remote convictions for the purpose of impeachment because the defendants had not led blameless lives since suffering the convictions that were remote in time. However, the subsequent or intervening convictions in both cases involved crimes of moral turpitude that were probative of the witnesses' honesty and credibility.

(*Mendoza*, *supra*, 78 Cal.App.4th at p. 926.) That is not the case here. As the trial court observed, none of Barrymore's intervening convictions involved crimes of moral turpitude.

For these reasons, we conclude that the trial court did not abuse its discretion when it excluded evidence of John Barrymore's 1985 conviction for auto theft.

Cumulative Error

Since we find no error, we reject defendant's claim of cumulative error.

DISPOSITION

The judgment is affirmed.

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McAdams, J.

WE CONCUR:

_____
Bamattre-Manoukian, Acting P.J.

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Mihara, J.